STATE OF MICHIGAN
IN THE SUPREME COURT

THE PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

v

Supreme Court
No. 126379

KEVIN M. ROBINSON
Defendant-Appellee.

Third Circuit Court No. 00-009498-02
Court of Appeals No. 237036

APPELLANT'S BRIEF ON APPEAL

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Statement of Jurisdiction

By order dated May 12, 2005, this court granted the People's application for leave to appeal the Court of Appeals' unpublished decision dated April 29, 2004.

Statement of Question Involved

I.

When an individual acts with the intent to cause great bodily harm to another, and death results, the crime is murder. Defendant planned with his co-defendant to injure the victim – to cause him great bodily harm – defendant striking the first blow, allowing the co-defendant, who ultimately shot the victim to death, to gain the upper hand. For second-degree murder under an aiding and abetting theory, must the factfinder conclude that the aider and abetter intended to kill the victim where a finding of intent to do great bodily harm is sufficient?[1]

The People say: "No."

Defendant says: "Yes."

The Court of Appeals, in an 18 page unpublished opinion, said: "Yes."

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[1] Included in the People's discussion will be those questions noted in this Court's order granting leave to appeal: 1) the elements of accomplice liability under MCL 767.39, and 2) whether intent to cause great bodily harm is sufficient to support a conviction for aiding and abetting second-degree murder.

Statement of Facts

Trial court:

Co-defendant Pannell was tried by a jury, while defendant Robinson elected to have the trial court decide his case. After the prosecutor gave his opening statement, the parties agreed to a stipulation regarding testimony from the medical examiner. The stipulation stated that the cause of death of the victim was a single gunshot wound to the head, and the killing was a homicide.

Dushawn Walker knew the deceased, but had never seen the defendants. On July 29, 2000, Walker saw a car pull up in front of the victim's house and two people got out. The passenger looked like he was reaching for something as they walked up to the porch.[2] Walker heard a knock on the door, and moments later, he heard a gunshot come from the house. Walker went by the victim's house maybe 7 minutes later and the car he had seen was gone. Police came up to the house; they talked with him and considered him a suspect. Walker told the police about the car he had seen, and said that the passenger had something shiny in his hands.

Brandi Brewer said defendant Robinson was her fiancé, and that the co-defendant, Pannell, was her aunt's boyfriend.[3] Brewer recounted how the victim, Thomas, came to Pannell's house earlier that evening and had a heated conversation with Pannell after Thomas had stated he would beat the "kids' ass." Pannell became very angry after hearing that.[4] Pannell exclaimed he would not allow Thomas to disrespect Brewer or the kids, and that he would "beat his ass," referring to Thomas. Pannell expounded that he would go to Thomas's house and kill him, repeating the threat

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[2] 7a.

[3] 17a.

[4] 19a.

twice.[5] Pannell stated he was going over there at that point, and Robinson joined him. Both left the house.[6]

The two men drove to Thomas's house in Robinson's blue Cavalier, with Pannell on the passenger side.[7] Later, Robinson came back alone with the car, and was very upset. Six or seven minutes later, Pannell arrived back at his house, with a cut on his right hand. He stated that he had gone "around the corner to take care of his business" and had "killed the mother-fucker."[8] Brewer walked outside with Pannell for a while and he gave her the details of what he had done. He said he shot Thomas in the head, and that he was going to go back to the house to "make sure he took care of business."[9]

Brewer saw Pannell go into Thomas's house. She noted the door was off the hinges. Later, Pannell told Brewer he kicked Thomas to make sure was dead, and stated he was "deader than a door knob." He again said that he had shot the victim in the head. Brewer noted that when she saw Robinson, he had a cut on his head near his eyebrow.[10]

During cross-examination, Brewer reiterated how Pannell and Robinson left together about 10 p.m. that evening, and were gone about ½ hour. She again explained how Pannell had told her how he shot Thomas, and, in response to a question as to whether the information defendant gave

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[5]23a.

[6]25a-26a.

[7]27a.

[8]34a.

[9]35a.

[10]40a.

her differed from what Pannell had related, she stated the gist of the information from defendant "would say that he [Pannell] had a gun" when they both were at Thomas's house.[11] On redirect, Brewer related how Robinson told her the victim had taken a swing at Pannell but hit him, Robinson. Robinson said he then hit Thomas back.[12]

Brewer explained that when he came back to the house alone, Robinson was upset with Pannell but did not tell her why. Robinson was so upset with Pannell about something that had happened that he wanted to leave immediately. He was ready to go when Pannell finally came back.[13] Brewer also related that Robinson told Pannell to "get the f— away from him" when Pannell returned and that Pannell was "scandalous."[14]

Robinson's statement to the police was read into evidence to the trial court. Pannell's jury was not present. In his statement, Robinson stated he took Pannell to Thomas's house, and once there, and inside, Robinson hit Thomas in the face and in the neck. Pannell hit Thomas twice, and kicked him when he was down.[15] Robinson said he left Pannell in the house with Thomas, and moments later heard a gunshot.

During defendant's closing argument, the court asked a question about the People having claimed the crime was "great bodily harm" second-degree murder, to which counsel argued the

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[11] 51a.

[12] 55a.

[13] 43a-46a.

[14] 58a, 63a.

[15] 66a.

concept of abandonment.[16] Then the court referred to defendant's statement, and said that "granted he did not see a gun, didn't know he had a gun" but the second or third prong appeared to make the crime great bodily harm with a resultant murder. After defense counsel again claimed defendant had broken off his course of conduct and left the house, the court asked the prosecutor to address the "lack of evidence" that defendant had knowledge of a weapon, and the concept of great bodily harm in the matter.

The prosecutor spoke of some points in defendant's statement as self-serving and others as being truthful. He argued that the mere fact a weapon was used and that defendant was involved satisfied the second prong of second-degree murder. As he stated: "The crime might not have happened if it wasn't for defendant."[17]

Trial court's findings of fact:

In its findings of fact, the trial court concluded that Robinson was guilty of second degree murder, under the prong concerning assault with intent to do great bodily harm. The court explained its findings with a preface that it was a difficult decision. The court believed that defendant was asleep in the Pannell house that evening, but that when he came downstairs, defendant heard Pannell ranting about going to beat up Thomas, about going to "f— him up."[18]

The court also believed that Pannell was still "ranting and raving" when he and defendant got in defendant's car, and that defendant was in charge of driving the car wherever it went that

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[16] 70a.

[17] 75a.

[18] 77a.

evening, and that Pannell said he would show defendant where Thomas lived.[19] The court inferred that defendant was, at that point, by his actions, agreeing to take Pannell to Thomas's house. Next, defendant parked in front of the house, and both men went to the door. Defendant admitted that he and Pannell were going to "f— him up."[20]

Pannell knocked on the door and Thomas answered, then opened the door. As soon as he opened the door, defendant back-handed him, Thomas stumbled back, and defendant back-handed him again in the neck. Thomas fell to the floor and Pannell punched him twice.[21] Pannell kicked the guy, and defendant said he told Pannell "that's enough," but Pannell continued.

The court then stated that all of the evidence to that point showed that defendant was the one who initiated the attack, and that he was the person who asked where Thomas lived. The court also said it appeared defendant was the one giving orders.[22] It was defendant who told Pannell to stop kicking Thomas and it was defendant who said he left and went to his car. It was also defendant who explained he heard a gunshot come from the house shortly after he left the building. When defendant was asked by the police if he had seen Pannell with a gun, he replied: "I'm not saying he didn't have one but I didn't see one."[23] Defendant explained he found out Thomas was dead when Pannell's girlfriend called him later. That was when he knew that Pannell had killed Thomas, according to defendant's statement.

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[19]79a.

[20]80a.

[21]81a.

[22]Id.

[23]82a.

The court said it concluded the prosecution had "proven the count of Second Degree Murder on the prong of great bodily harm only."[24] It did not find defendant had a clear intent to kill when he drove to Thomas's house, and did not base its decision on the "reckless disregard" prong of malice. Based on defendant's own admissions, it was clear defendant and Pannell were going over to "f— him up" and that made defendant guilty of second degree murder "under GBH."[25]

The court indicated it understood the defense arguments about aggravated assault and great bodily harm and abandonment, but it said it would consider those points at sentencing. Defense counsel insisted on making the point again that the death did not result from the beating but from the gunshot, which was not the course of action contemplated by defendant and Pannell at first.[26] The court responded to counsel, saying defendant had to ask directions to Thomas's house, he was driving, and he did not have to go there. Defendant was also the one that struck Thomas first and got him down on the floor.

The court repeated that defendant initiated the assault, and that the facts allowed the inference that defendant's conduct allowed Pannell to "get the upper hand."[27] Those facts together were sufficient for the court to find guilt under the great bodily harm prong of second-degree murder.[28]

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[24]84a.

[25]85a.

[26]86a.

[27]88a.

[28]89a.

At sentencing, the court said that the guidelines for second degree murder were 162 to 337 months, but that it would deviate downward. It imposed a sentence of 71 months to 15 years, a sentence the court said was "somewhat consistent with manslaughter guidelines."[29]

Court of Appeals:

In an 18-page, unpublished opinion, dated April 29, 2005, the Court of Appeals reversed Robinson's conviction and sentence, reduced the charge to assault with intent to do great bodily harm less than murder, and remanded for resentencing.[30] In reaching its conclusions, the court posed the question presented as "whether Robinson could properly be convicted of second-degree murder, under the intent to inflict great bodily harm prong, as an aider and abettor of Pannell, on the factual findings of the judge."[31]

By way of explanation, the court stated that a "necessary element of murder" was missing because the factfinder held that Robinson intended to inflict great bodily harm only, and the "injuries inflicted with that intent were not the cause of death."[32] The opinion also said that an element of aider and abettor liability was missing, that being failure of the trial judge to find that when Robinson committed the acts that he did, he intended to assist Pannell in *killing* the victim, thereby being aware of Pannell's intent to kill.

There was sufficient evidence to support a conviction of second-degree murder, the court stated, but, after parsing the trial judge's findings of fact, the court explained that because of the

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[29]94a.

[30]112a.

[31]96a.

[32]97a.

lower court's findings of fact that Robinson "agreed" and "understood" that he was with Pannell to beat up Thomas ("f--- him up"), the shooting was beyond the scope of what Robinson had intended to happen. Because Robinson intended only to inflict great bodily harm on the victim, the conviction for second-degree murder as an aider and abettor had to be reversed.[33]

To support its conclusion, the court then stated that "Robinson could only be convicted of second-degree murder as an aider and abettor only if he provided aid to Pannell in killing the victim with the intent to so aid Pannell in killing the victim, sharing or aware of Pannell's intent to kill."[34] To expound on that point, the court looked briefly at the drawing of permissible inferences from facts presented, and concluded that "(t)he possible inference and finding of the third prong intent, from knowledge of the principal's first prong intent or second prong intent, is not a mandatory inference."[35] The court looked again at the judge's findings and stated that the trial judge "drew no such inference, and did not find Robinson guilty under the wanton and willful (third) prong."[36]

By order dated May 12, 2005, this Court granted the People's application for leave to appeal. The order granting the application directed the parties to include two issues: 1) the elements of accomplice liability under MCL 767.39; and 2) whether intent to cause great bodily harm is sufficient to support a conviction for aiding and abetting second-degree murder.

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[33]102a.

[34]108a.

[35]110a.

[36]Id.

ARGUMENT

I.

When an individual acts with intent to cause great bodily harm to another, and death results, the crime is murder. Defendant planned with his co-defendant to injure the victim – to cause him great bodily harm – defendant striking the first blow, allowing the co-defendant, who ultimately shot the victim to death, to gain the upper hand. For second-degree murder under an aiding and abetting theory, the factfinder need not conclude that the aider and abettor intended to kill the victim, as a finding of intent to do great bodily harm is sufficient.

Standard of review

Review of the sufficiency of the evidence requires the court to evaluate the evidence in a light most favorable to the prosecution and to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt.[37] A court's findings of fact are reviewed under a clearly erroneous standard.[38] Statutory interpretation is a question of law and is reviewed de novo.[39]

Discussion

A. Introduction: The Questions Presented

Defendant participated with one Sam Pannell in a premeditated joint attack on the victim. The events commenced when defendant woke up on the day of the murder and "all you could hear

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[37] *People v Wolfe,* 440 Mich. 508, 515 (1992).

[38] MCR 2.613(C).

[39] *People v Phillips,* 469 Mich. 390, 394 (2003).

through the house was Sam saying I'm going to f**k him up."[40] Pannell also said he was going to "f**k him up" when he and defendant were in the car, but Pannell wouldn't say who he meant. Defendant admitted that he was driving, and "Sam said he'd show me where this guy lives." [41] Pannell pointed out the house; it was "*understood between us* that we were going to f**k him up."[42] The victim opened the door and defendant backhanded him in the face, causing him to stumble back. Defendant and Pannell went in, and defendant backhanded the victim again. As the victim was falling, Pannell punched him twice with his fist, and then Pannell started kicking him.[43] Defendant claimed in his statement that he then said "that's enough, but Sam kept kicking him." Defendant said he left the house and went outside, and while getting in his car he heard one gunshot from the house. He then left.[44]

The trial judge convicted defendant of second-degree murder (Pannell was convicted by a jury of first-degree murder), finding that though defendant did not share Pannell's intent to kill, defendant did intend to cause great bodily harm,[45] and the result of his assistance to Pannell was the death of the victim. Defendant had to ask directions, and he drove the two of them to the victim's house. He struck deceased, and got him down on the ground.[46] Defendant commenced the assault

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[40] 77a.

[41] 79a.

[42] 80a. (Emphasis added).

[43] 81a.

[44] 82a.

[45] The trial judged inferred from the intent to "f**k him up" the intent to do great bodily harm. 87a.

[46] 88a.

on the victim: "he initiated it. He got the guy down from the ground....it was defendant who knocked deceased to the ground that enabled Sam to get the upper hand."[47]

The Court of Appeals reversed the conviction, concluding that the fact-finding of the trial judge was insufficient to support the conviction of the defendant as an aider and abettor to second-degree murder. The critical finding of the Court of Appeals is that:

- the judge did not find a necessary element of aider and abettor liability, that the acts committed by Robinson, pursuant to the plan to inflict great bodily harm, *were committed by him with the intent to aid Pannell in killing the victim*....Nor did the judge find that Robinson provided aid *sharing or aware of Pannell's intent to kill the victim.*[48]

The court also appears to have found that defendant was not liable for the murder on causation grounds:

- the cause of death was not injuries inflicted during the assault with intent to inflict great bodily harm: the judge found that death was caused by a gunshot to the victim's skull after Robinson left the scene.[49]

In short, the Court of Appeals has created a distinction between principals and aiders and abettors before the fact by holding that an aider and abettor to second-degree murder must intend to cause the death of the victim, either personally, or by sharing or at least being aware of the intent to kill of the principal, though for the crime of second-degree murder the principal need not entertain the intent to kill at all,[50] and though under Michigan statute there is no distinction between principals

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[47] 88a.

[48] 97a. (Emphasis added).

[49] 95a.

[50] See e.g. *People v Langworthy*, 416 Mich 630 (1982).

and accessories before the fact, all distinctions having been abrogated by the legislature. Further, the Court of Appeals has held also that where one acts with the intent to cause great bodily harm, and his confederate strikes a blow that causes death, the defendant is not responsible for the homicide because not the "cause" of the death. In other words, the court found both *mens rea* and *actus rea* missing under the facts found by the trial judge. Neither conclusion is the law.Michigan law on murder only requires that where multiple actors proceed to effectuate a common purpose, criminal in nature, and if acting on that purpose they cause death, the resultant crime is murder without regard to whether any of the actors specifically intended to cause death.

This court granted the People's application for leave to appeal, and directed that among the issues addressed the parties address:

(1) The elements of accomplice liability under MCL 767.39; and

(2) whether intent to cause great bodily harm is sufficient to support a conviction for aiding and abetting second-degree murder. See*People v Langworthy*, 416 Mich 630 (1982); *People v Kelly*, 423 Mich 261 (1985).

The People will first address these questions, and then consider the questions, also pertinent given the opinion of the Court of Appeals, of *causation*, and *withdrawal* as it affects (or does not affect) accomplice liability.

B. The Task of Discovery: The Elements of Accomplice Liability under MCL 767.39

There is no separate *crime* of "accessory before the fact" or "aiding and abetting" in this state; rather, our statute declares, with a statutory catch-line "Abolition of distinction between accessory and principal," that:

> Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures,

> counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense.

This abolition of the common-law distinctions between accessories before the fact and principals is of reasonably ancient vintage, existing in this state for at least a century and a half.[51] It is somewhat startling, then, that the requisites for culpability under the statute remain unclear, but they do, and this is not a state of affairs in which Michigan stands alone.[52] Because the statute is but an abolition of common-law distinctions, causing equality of culpability between principals and aiders and abettors, it is the common law that one must first reconnoiter to gain some footing on the question.

(1) The Common-Law Abolition of Distinctions Between Principal and Accessory

At the common law, one was guilty of a felony in one of four ways: either as principal in the 1st degree, a principal in the 2nd degree (sometimes known as an accessory *at* the fact), an accessory

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[51] See e.g. *People v. Brigham,* 2 Mich. 550 (1853), noting that "Sec. 1, chap. 161, title 30, makes an accessory before the fact to any *felony,* punishable in the same manner as may be prescribed for the punishment of the principal felon," and *Shannon v. People*, 5 Mich 71 (1858), observing that "[T]he act of 1855, section 19 (*Laws of 1855, p. 145; sec. 6065 of Compiled Laws*), enacts "that the distinction between an accessory before the fact and a principal, and between principals in the first and second degree, in cases of felony, is abrogated; and all persons concerned in the commission of a felony, whether they directly commit the act constituting the offense, or aid and abet in its commission, though not present, may hereafter be indicted, tried, and punished as principals, as in the case of a misdemeanor.""

[52] Though the distinction between accessories before the fact and principals was abrogated federally in 1909, it has been said that under the federal cases applying the federal statute "the current status on the law of the aider and abettor's mental state is far from clear. In fact, it is best described today as in a state of chaos—a chaos to which the cases seem oblivious." Baruch Weiss, "What Were They Thinking?: The Mental States of the Aider and Abettor and the Causer Under Federal Law," 70 Fordham L Rev 1341, 1351 (2002).

before the fact, or an accessory after the fact.[53] A principal in the 1st degree did the act either himself, or by means of an innocent agent (a dupe).[54] A principal in the 2nd degree was present, lending his countenance and encouragement, or otherwise aiding, while another did the act. As Stephen put it, "[E]very person who takes part in the actual execution of a crime is a principal, even if he is present only for the purpose of aiding or countenancing the person by whom the crime is actually committed. Such persons were formerly described as accessories at the fact, and are now called principals in the second degree."[55] For example, "[A] person waiting outside of a house to receive goods which his confederate is stealing within, is an illustration of a principal of the second degree,"[56] while at the common law "[A]n accessory before the fact is one whose will contributes to another's felonious act, committed while too far himself from the act to be a principal."[57] The distinction between an accessory before the fact and a principal in the second degree, then, was presence. [58] These

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[53] 1 Bishop, *Criminal Law* (4th edition, Little, Brown and Co.: 1867), § 595, p.343. The statute does not involve accessories *after* the fact, and accessory after the fact is treated as a separate, and less culpable, offense. MCL 750.505.

[54] Bishop, § 596, p. 343. This point demonstrates the complexity of the law that the abolition of the common-law distinctions was designed in part to avoid: at common law one providing a poison to a confederate to administer to a victim was, when the victim partook of the poison and died, an accessory before the fact, the actual administrator of the poison being the principal. But if the administrator was a dupe of the supplier, and acted innocently, he could not be the principal, and without a principal there could be no aider and abettor, and the actual murderer would escape culpability. In this situation, the *supplier* was considered the principal. See Perkins, *Criminal Law* (1st Edition) (Foundation Press: 1957), Chapter 6, § 8(C)(1), p. 569.

[55] 2 Stephen, *History of the Criminal Law of England* (McMillan and Co: 1883), p. 230.

[56] Bishop, § 602, p. 347.

[57] Bishop, § 616, p. 354.

[58] Perkins, Chapter 6, § 3, p. 575: an accessory before the fact is "one who meets very requirement of a principal in the second degree except that of presence at the time."

distinctions existed to ameliorate to some degree the harshness of punishment during this time, for virtually all felonies were punishable by death, and these distinctions allowed for lesser penalties.[59] But as the harshness of the penalty for felony diminished, these distinctions became "only formal, having no practical use or effect whatever,"[60] and it came to be said that for this reason they should "should not be preserved in the books,"[61] leading to statutory abolitions such as MCL 767.39.

(2) Michigan Law on Actus Reus

A person "who knowingly and willingly helps or cooperates with someone else in committing a crime is called an accomplice."[62] Anyone "who intentionally assists someone else in committing a crime is as guilty as the person who directly commits it and can be convicted of that crime as an aider and abettor."[63] Aiding and abetting "describes all forms of assistance rendered to the perpetrator of a crime and comprehends all words or deeds that might support, encourage, or incite the commission of a crime."[64]

In *People v Pitts,*[65] the court repeated the definition of "abet" from Black's Law Dictionary: "ABET. To encourage, incite, or set another on to commit a crime. This word is always applied to aiding the commission of a crime. To abet another to commit a murder is to command, procure, or

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[59] See 4 Blackstone, *Commentaries* (Legal Classics Library Edition, 1983), Chapter 3, p.39-40.

[60] Bishop, § 596, p. 343.

[61] Bishop, § 596, p. 344.

[62] CJI2d 5.5(2).

[63] CJI2d 8.1(2).

[64] *Carines,* supra.

[65] *People v Pitts,* 84 Mich. App. 656, 659-660 (1978).

counsel him to commit it. Old Nat. Brev. 21; Co.Litt. 475. "'Aid' and 'abet' are nearly synonymous terms as generally used; but, strictly speaking, the former term does not imply guilty knowledge or felonious intent, whereas the word 'abet' includes knowledge of the wrongful purpose and counsel and encouragement in the commission of the crime."

And in *People v Moore*[66] this Court said, citing 21 Am.Jur. 2d, Criminal Law, Sec. 206, p. 273: "Aiding and abetting means to assist the perpetrator of *a* crime. An aider and abettor is one who is present at the crime scene and by word or deed gives active encouragement to the perpetrator of the crime, or by his conduct makes clear that he is ready to assist the perpetrator of such assistance is needed." Also explaining the term is *People v Palmer,*[67] where this Court said, in regard to the term "aiding and abetting:" "This term comprehends all words or deeds which may support, encourage or incite the commission of a crime. It includes the actual or constructive presence of an accessory, in preconcert with the principal, for the purpose of rendering assistance, if necessary. [Cite omitted.] The amount of advice, aid or encouragement is not material *if it had the effect of inducing the commission of the crime.*"[68]

Review of the facts in *Palmer* provides an example of the concept "effect of inducing the commission of the crime." Witnesses testified that Palmer arrived at the victim's house accompanied by the co-defendant, Dunaway. Both men went into the victim's house, and moments later, escorted the victim, DiMaggio, toward a waiting car. When DiMaggio's wife tried to intervene, defendant warned her away, and moved to prevent her from interfering. After Dunaway and DiMaggio entered

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[66]*People v Moore,* 470 Mich. 56, 63 (2004) (emphasis added).

[67]*Peop.le v Palmer,* 392 Mich. 370, 378 (1974).

[68]Id (emphasis added).

the car, Palmer also got in and left with the men. There was evidence that Dunaway struck DiMaggio while in the car. This Court, reviewing the evidence in a light most favorable to the prosecution, held that a jury could have concluded that Palmer had acted "in silent unison with Dunaway, remained in position to render assistance, if necessary, and took positive action to prohibit interference with Dunaway's intentions."[69] Palmer's words and deeds had the effect of inducing and aiding Dunaway in the commission of the crime, and supported the guilty verdict of involuntary manslaughter, DiMaggio having died from a beating to the head.

(3) Michigan Law on Mens Rea

The Court of Appeals found that the defendant lacked the requisite *mens rea* to be guilty of murder in the second degree as an accomplice, misdescribing the requisite *mens rea* as an intent to kill. *Mens rea* is the idea of a guilty mind or criminal intent that covers much of the relationship between the individual and the criminal law.[70] As the court said in *United States v Cordoba-Hincapie*,[71] "[W]estern civilized nations have long looked to the wrongdoer's mind to determine both the propriety and the grading of punishment"; the "mantra" of the criminal law is that "(a)n act does not make [the doer of it] guilty, unless the mind be guilty; that is, unless the intent be criminal." While early on in English law the law was "hostile to the notion of examining an individual's mental state,"[72] the law evolved otherwise, with scholars remarking that "[T]he history of the recognition

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[69]Id., 379.

[70]See *United States v Cordoba-Hincapie,* 825 FSupp 485, 489-496 (ED, NY 1993).

[71]Id., 490.

[72]Id..

of culpable states of mind should be viewed as a continuing process of self-civilization."[73] And once the law recognized the concept of moral blameworthiness, "the law embarked upon the long journey of refinement and development of culpability distinctions that continues to this day."[74]

By the time that Blackstone wrote his *Commentaries* in the 18th century it was understood that "...to make a complete crime cognizable by human laws, there must be both a will and an act. ..."[75] Nonetheless, the law is not a mind-reader, and proof is ordinarily external or objective; as put by Oliver Wendell Holmes, the "test for culpability should be primarily an 'external' one and the *mens rea* requirement is satisfied as long as the actor *is aware of circumstances 'in which [his or her acts] will probably cause some harm which the law seeks to prevent.*'"[76]

With this background in mind, then, what mental state is required for aiding and abetting or accomplice liability, bearing in mind the differing mental states required for various crimes in order to show guilt of the principal actor; more particularly, what mental state is required for accomplice liability for murder, an offense not requiring proof that the principal intended to take life–indeed, a crime that is a "general intent" crime?

(a) Either intent or knowledge

Michigan law on aiding and abetting is summarized in the Standard Criminal Jury Instructions, which, though not mandatory, are employed by almost all judges in the state. Those instructions inform the jury that either of two states of mind will suffice for conviction: "...the

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[73]Id., 491.

[74]Id.

[75]Id. 492.

[76]Id., 493 (emphasis added).

defendant must have *intended the commission of the crime alleged* or must have *known that the other person intended its commission* at the time of giving the assistance."[77]

These instructions are essentially consistent with Michigan case law on the point. That either acting with the intent required by the elements of the crime committed by the principal, or acting with knowledge that the principal possesses that intent, is sufficient for guilt as an aider and abettor was discussed in some depth in *People v Poplar,*[78] where the defendant was charged under an aiding and abetting theory with breaking and entering and assault with intent to commit murder. The actual breaking and entering was carried out by two confederates with defendant acting as lookout. When the manager of the building discovered the two men, one shot him in the face with a shotgun. The court, affirming the convictions, said that:

> Where a crime requires the existence of a specific intent, an alleged aider and abettor cannot be held as a principal unless he himself possessed the required intent or unless he aided and abetted in the perpetration of the crime knowing that the actual perpetrator had the required intent. 22 C.J.S. Criminal Law s 87; 21 Am.Jur.2d, Criminal Law, s 124. 'But it is the knowledge of the wrongful purpose of the actor plus the encouragement provided by the aider and abettor that makes the latter equally guilty.[79]

Since *Poplar,* that acting with knowledge of the intent of the principal is sufficient for guilt on an aiding and abetting theory has been repeated in many decisions.[80]

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[77] CJI 2nd 8.1(3) (emphasis added).

[78] *People v. Poplar*, 20 Mich App 132, 134 (1969).

[79] Id, at 136-137.

[80] See e.g. *People v. Everett*, 27 Mich.App. 120 (1970); *People v. Penn*, 70 Mich.App. 638 (1976); *People v. Pitts*, 84 Mich.App. 656 (1978); *People v. Powell*, 90 Mich.App. 273 (1979); *People v. Triplett*, 105 Mich.App. 182 (1981); *People v. Karst*, 118 Mich.App. 34 (1982); *People v. King*, 210 Mich.App. 425 (1995); *People v. Barrera*, 451 Mich. 261 (1996);

Of some particular note is *People v Kelly,*[81] where a jury convicted Kelly of felony-murder, and this Court held that there was overwhelming evidence of Kelly's intent sufficient to support his aiding and abetting conviction even if certain jury instructions were ambiguous. The facts showed that Kelly and Moses, the co-defendant, acted in concert to rob and assault Espy, the victim, in his residence and that Espy was later found dead, with a large cutting wound on the side of his neck. The prosecution charged Kelly under two theories: 1) that he committed the felony-murder, or 2) that he aided and abetted Moses. Kelly admitted to helping Moses remove property from Espy's house but denied any part in the killing. Before affirming Kelly's conviction, the Court reviewed objected-to instructions and paid close attention to the instructions on aiding and abetting. After citing MCL 767.39, the aiding and abetting statute, the Court stated that the required intent "is that necessary to be convicted of the crime as a principal."[82]

With reference to *People v Aaron,*[83] the opinion explained that in order to convict Kelly as an aider and abettor in the felony murder, the prosecution had to be show that he had "the intent to kill, the intent to cause great bodily harm or wantonly and willfully disregarded the likelihood of the natural tendency of his behavior to cause death or great bodily harm."[84] Reviewing the evidence on those points, the panel stated that the criminal enterprise in the case was "cooperative in nature" and

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People v. Carines, 460 Mich. 750 (1999); *People v. Moore*, 470 Mich. 56 (2004). And see *People v. Kennan*, 275 Mich. 452 (1936); *People v. Allen*, 299 Mich. 242 (1941).

[81]*People v Kelly,* 423 Mich. 261 (1985).

[82]Id., 278.

[83]*People v Aaron,* 409 Mich. 672 (1984).

[84]*Kelly,* 278.

that even if Kelly did not have the intent to murder when he entered Espy's house, he formulated it once inside or became aware of Moses's intent at some point, given the evidence presented.

Dissenting in part, Justice Levin agreed that "evidence that one has participated in committing an offense other than murder with knowledge that an accomplice intended in the perpetration of the offense to kill or cause great bodily harm will generally be sufficient to support a finding of aiding and abetting murder should the accomplice commit that offense," but took the view that while knowledge of the intent of the principal supports an inference of intent, it is not sufficient standing alone, and so the jury should not be instructed in that manner.[85] Justice Levin's view has not prevailed, and should not.

The prevailing Michigan view is well-supported in the literature. Perkins says that

> If the charge is first degree murder based upon an alleged deliberate and premeditated killing, the abettor is not guilty of this degree of the crime unless he either acted upon a premeditated design to cause the death of the deceased or knew that the perpetrator was acting with such an intent, and the same may be said of assault with intent to kill.[86]

And in Clark and Marshall's treatise it is said that "When a specific intent is necessary to constitute a particular crime, one cannot be a principal in the second degree to that particular offense unless he entertains such an intent, or knows that the party actually doing the act entertains such intent."[87]

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[85] Id., at 287-288.

[86] Perkins, p. 574.

[87] Clark and Marshall, *Crimes* (Callaghan and Co: 1967), § 8.02, p. 512-513. Professor LaFave catalogues some of the confusion on this point, see LaFave, *Substantive Criminal Law* (West: 2003), § 13.2(d), p. 347-351, but most of that confusion arises in the federal system, discussed here below.

(b) Natural or probable consequences rule

Justice Levin also took the view in *Kelly* that an instruction that one is guilty of aiding and abetting a crime when it "was fairly within the criminal plan and the defendant might have expected this to happen" is erroneous. In *People v. Knapp*[88] this Court said:

> There can be no criminal responsibility for anything not fairly within the common enterprise, and which might be expected to happen if occasion should arise for any one to do it.

Justice Levin argued that nonetheless it "does not follow that there *is* criminal responsibility for anything 'fairly within the criminal plan' that the accused 'might have expected' to happen," citing to *People v. Foley.*[89] This is an odd view of the court's statement in *Knapp*. The court was explaining why liability there did not exist—because the act was not "within the common enterprise" and what the defendant "might have expected to happen." Why would the court have made this distinction if there was no liability even if that which occurred *was* within the criminal plan, or something the accused "might have expected to happen"? If an appellate court were to say that the evidence in the case was "insufficient to show malice," one might fairly take it that if the evidence *was* sufficient to show malice, then the case would have been made out.[90]

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[88] *People v. Knapp,* 26 Mich. 112, 115 (1872).

[89] *People v. Foley,* 59 Mich. 553, 26 N.W. 699 (1886).

[90] *People v. Foley,* 59 Mich. 553 (1886). And the facts of the two cases show the distinction. In *Knapp* the defendant and several others were having nonconsensual sex with the victim in an upper story of defendant's paint shop, and that in an attempt by these actors to escape someone other than the defendant had thrown or pushed the victim out the window. There was no evidence that defendant did this act, and the court found no proof that it was "within the common enterprise" or something the defendnat "might have expected to happen." He was thus not responsible as an aider and abettor. In *Foley* a group including defendant attacked several other men, for the sheer purpose of beating them. One of them tore one of the victim's vest off and took his money. The court found no proof that robbery was within the

Knapp's formulation that one is responsible as an aider and abettor for that which is within the scope of the enterprise, or what he or she "might have expected to happen," is referred to both in case decisions and treatises as the "natural and probable consequences" doctrine. That is, an aider and abettor is responsible not only for those offenses aided with intent to see them accomplished, or knowing the principal has the necessary intent, but for any offense that is the "natural and probable consequence" of the offense assisted. Clark and Marshall say that:

> ...if a person joins in a venture to commit some identified offense, by aiding, abetting, counseling, or commanding its execution, that person is legally treated as assenting to offenses committed by his associates during the execution of the common purpose and which harms are the natural or probable consequences of the initial effort.[91]

And Perkins agrees that an aider and abettor is "guilty of all incidental consequences which might reasonably be expected to result from the intended wrong, as where robbery, or attempted robbery results in the death of the victim."[92]

"common purpose" and so reversed that conviction. Cf. *People v Carter*, 96 Mich 583 (1893).

[91] Clark and Marshall, § 8.08, p. 531.

[92] Perkins, at 576

Illustrative of the extensive case law on the point is *United States v Brown*.[93] An insurance man left an home after a business call. Brown and a confederate, Clayborne, engaged in a brief discussion and followed him; Clayborne was in possession of firearms and several bags of watches. Clayborne gave the bags to Brown, attacked the insurance man, and eventually shot him. The court found that Brown aided and abetted the crime by holding the bags so Clayborne could accomplish the assault, and by acting as a lookout. As to the claim that though Brown may have intended to assist in the attack (and a robbery), he did not intend the murder, the court responded that "he need not necessarily have intended the particular crime committed by the principal; an accessory is liable for any criminal act which in the ordinary course of things was the natural or probable consequence of the crime that he advised or commanded, although such consequence may not have been intended by him." Here, the murder was a "natural and probable consequence of Brown's actions, which permitted Clayborne to fight the decedent with his hands free and to shoot him with a loaded weapon."[94]

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[93] *United States v Brown*, 509 F2d 473 (CA DC, 1974). As also illustrative of the point see *Pinkerton v United States*, 328 US 640, 66 S Ct 1180, 90 L Ed 2d 1489 (1946)(this is often known as the "Pinkerton doctrine"); *Fabian v Maryland*, 201 A2d 511, 517 (Maryland, 1964)(An accessory...is responsible for all crimes incidental to the criminal misconduct he counsels, or which are among its probable consequences"); *McKinney v Nevada*, 596 P2d 503 (Nev., 1979)("The killing of the victim, though not intended by the appellant, was a natural and probable consequence of the planned robbery"); *Kendall v Indiana*, 790 NE2d 122, 131 (Indiana, 2003) ("...the accomplice is liable 'for everything...which follows incidentally in the execution of the common design, as one of its natural and probable consequences, even though it was not intended as a part of the original design or common plan"); *Graham v United States,* 703 A2d 825, 832 (DC Court of Appeals, 1997)(proper to instruct jury that an "aider and abettor is legally responsible for the acts of other persons that are the natural and probable consequence of the crime in which he intentionally participates....").

[94] Id., at 481.

If anything, then, the standard jury instructions[95] should be modified to make this point more clear. But that an aider and abettor is responsible upon a showing that he or she acted with knowledge of the intent of the principal is correct and should remain in Michigan law.

Because much confusion in this area has been engendered by the federal cases, the People will turn as briefly as possible to these, to make the point that they are confused, and should not work any change in Michigan law.

(4) Federal authority

Judge Learned Hand has often justly been described as "the greatest judge never to be appointed to the Supreme Court."[96] And Judge Hand was the author of *United States v Peoni,*[97] cited even today in the federal system as authoritative on the question of aiding and abetting. Brought to mind is Dean Wigmore's remark concerning the then-extant Michigan "res gestae witness" rule that "[A]ny rule supported by the names of Campbell and Christiancy must receive respectful consideration; but it may be doubted whether they ever lent their great authority to a doctrine of so

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[95] CJI 2nd 8.4 informs the jurors that it "is not sufficient for the prosecutor just to prove that the defendant intended to help another in the common unlawful activity of [*state common criminal enterprise*]," and also instructs the jurors that in "determining whether the defendant intended to help someone else commit the charged offense of [*state charged offense*], you may consider whether that offense was *fairly within the common unlawful activity* of [*state common criminal enterprise*], that is, whether the defendant *might have expected the charged offense to happen as part of that activity*. There can be no criminal liability for any crime not fairly within the common unlawful activity" (emphasis added).

[96] See e.g. Gunther, *Learned Hand: The Man and the Judge* (Alfred A.Knopf: 1994); see also Posner, "The Learned Hand Biography and the Question of Judicial Greatness," 104 Yale L. J 511 (1994) ("Learned Hand is considered by many the third-greatest judge in the history of the United States, after Holmes and John Marshall; some might even rate him higher").

[97] *United States v Peoni,* 100 F2d 401 (CA 2, 1938).

little worth."[98] *Peoni* is cited as canonical, misdescribed, misunderstood, and ignored when to follow it literally would work an outrageous result. An examination of the case is thus necessary.

Peoni was convicted of three counts of possessing counterfeit money, and one count of conspiracy to possess it. The convictions were based on one sale by Peoni to an individual named Regno, who sold the same bills to one Dorsey, who was arrested trying to pass the bills. The question before the 2nd circuit was whether Peoni was an accessory to Dorsey's possession, and a party to a conspiracy with Regno that Dorsey should possess the counterfeit bills. Judge Hand, after reviewing the history of accessories as aiders and abettors, concluded that for an individual to be an aider and abettor he or she must "in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed. All the words used – even the most colorless, 'abet' – carry an implication of purposive attitude towards it."[99] Though Peoni clearly aided Regno's possession—this was not even an issue in the case—"it was of no moment to him whether Regno passed them himself...or whether he sold them to a second possible passer." While, continued Justice Hand, Peoni might even have been an accomplice to the passing of bills by Regno, he was not responsible for anything done by Dorsey, for "nobody, as far as we can find, has ever held that a contract is criminal, because the seller has reason to know, not that the buyer will use the goods unlawfully, but that some one further down the line may do so."[100]

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[98] 7 Wigmore, *Evidence* (Chadbourn Revision: 1978), § 2080, p.543.

[99] Id., 402.

[100] Id, at 403. For the same reasons the court found Peoni not liable for conspiracy: "it is absurd to say that Peoni agreed that Dorsey should have them [the counterfeit bills] from Regno."

Within two years of *Peoni* a circuit took a very different view. The fourth circuit in *Backun v United States*[101] considered a case of transporting stolen merchandise in interstate commerce; the actual transporter, Zucker, testified for the prosecution that he had purchased the stolen property from Backun, and partly on credit, and then was apprehended attempting to pawn it. He testified that Backun knew it was Zucker's custom to travel to the south to sell property (there being no market for the items, silverware, in New York), and that he had told Backun he wished to take the property on the road with him. Backun claimed that though he may have sold stolen property, he had nothing to do with its transportation in interstate commerce. The court disagreed:

> ...it is difficult to see why, in selling goods which he knows will make its [a felony] perpetration possible with knowledge that they are to be used for that purpose, [a person] is not aiding and abetting in its commission within any fair meaning of those terms. Undoubtedly he would be guilty, were he to give to the felon the goods which make the perpetration of the felony possible with knowledge that they would be used for that purpose; and we cannot see that his guilt is purged or his breach of social duty excused because he receives a price for them.
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> Guilt as an accessory depends, not on 'having a stake' in the outcome of crime... but on aiding and assisting the perpetrators; and those who make a profit by furnishing to criminals, whether by sale or otherwise, the means to carry on their nefarious undertakings aid them just as truly as if they were actual partners with them, having a stake in the fruits of their enterprise. To say that the sale of goods is a normally lawful transaction is beside the point. The seller may not ignore the purpose for which the purchase is made if he is advised of that purpose, or wash his hands of the aid that he has given the perpetrator of a felony by the plea that he has merely made a sale of merchandise. One who sells a gun to another knowing that he is buying it to commit a murder, would hardly escape conviction as an accessory to the murder by showing that he received full price for the gun; and no difference in principle can be drawn between such a case and any other case of a seller who knows that the purchaser intends

[101] *Backun v United States*, 112 F2d 635 (1940).

> to use the goods which he is purchasing in the commission of felony.[102]

But because it was cited with approval by the United States Supreme Court in *Nye and Nissen,*[103] *Peoni* has become the federal "rule," but a rule that is, as indicated, misunderstood, misdescribed, and, when necessary, avoided. This latter point is revealed by a seventh circuit case, written itself by a rather celebrated judge.

In *United States v Fountain,*[104] Fountain was in prison for murder, and together with one Silverstein had murdered an inmate in prison. Silverstein killed yet another inmate, and additional security measures were taken by the prison; Silverstein and Fountain were shackled and accompanied by guards everywhere they went in the prison. Silverstein while being so accompanied from the shower to his cell managed to place his hands inside a cell occupied by one Gometz. A guard heard a "click" of the handcuffs being released, and saw Gometz raise his shirt to reveal a home-made knife in his waistband. Silverstein drew the knife and killed one of the guards.[105] Gometz was tried for the murder as an aider and abettor. A part of his claim on appeal was that even if he knew the purpose for which Silverstein intended to use the shank, he was indifferent to that use, and did not, under *Peoni*, participate in the killing "as in something that he wishes to bring about."

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[102] Id, at 637-638.

[103] *Nye and Nissen, et al. v United States,* 336 US 613, 69 SCt 766, 93 Led 919 (1949).

[104] *United States v Fountain,* 768 F2d 790 (CA 7, 1985).

[105] Precisely the same scenario occurred with Fountain, who also killed a guard, and wounded two others; the inmate who provided the "shank" was apparently not prosecuted in his case.

In short, though he may have acted with knowledge of Silverstein's purpose, he did not share it, and thus could not be convicted given the rule of *Peoni*.

Judge Posner recognized *Peoni* and *Nye and Nisson*, but observed that where the crime is "particularly grave" there is "support for relaxing" the requirement that the aider and abettor must share the principal's purpose. Indeed, Judge Posner continued that though the holding of *Backun* may have been superseded, its statement that "one who sells a gun to another knowing that he is buying it to commit a murder, would hardly escape conviction as an accessory to the murder by showing that he received full price for the gun," made *"so compelling an appeal to common sense that Gometz's opening brief in this court...states 'Defendant Gometz has no quarrel with this rule of law.'"*[106] The court concluded that, despite *Peoni*, aiding and abetting murder may be shown by proof beyond a reasonable doubt that the person who supplied the murder weapon knew the purpose for which it was intended. The prosecution was not required to prove that the accomplice, the aider, had the same intent as the principal, or wished to advance his or her purpose.

Judge Posner called *Peoni* into question again in *United States v Ortega*.[107] With regard to assistance at a drug transaction (the defendants unwittingly selling to undercover agents), Judge Posner asked with regard to Ortega,

> what if he merely rendered assistance, without being compensated or otherwise identifying with the goals of the principal? We do not think it should make a difference, provided the assistance is deliberate and material. One who, knowing the criminal nature of another's act, deliberately renders what he knows to be active aid in the carrying out of the act is, we think, an aider and abettor even if there is no

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[106] Id, at 798 (emphasis added).

[107] *United States v Ortega*, 44 F3d 505 (CA 7, 1995).

> evidence that he wants the act to succeed—even if he is acting in a spirit of mischief.
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> The law rarely has regard for underlying motives. *Peoni's* formulate for aiding and abetting, if read literally, implies that the defendant must to be convicted have some actual desire for his principal to succeed. But in the actual administration of the law *it has always been enough that the defendant, knowing what the principal was trying to do, rendered assistance that he believed would (whether or not he cared that it would) make the principal's success more likely....*"[108]

Moreover, *Peoni* has been misunderstood. It is not an aiding and abetting case involving knowledge or intent, but a "natural and probable consequences" case involving an act "down the line." There was no question that Peoni aided Regno's possession when he sold him the counterfeit money, and the court implied that he may well have aided Regno's passing of the bills; it was the passing by Dorsey after Regno had passed the bills to him for which the court found no liability on the part of Peoni. And the language of *Peoni* should not be read literally as creating a subjective test in any event, for viewed carefully the opinion contains no such requirement, saying that the aider must "participate in [the crime] *as in* something that he wishes to bring about." *Peoni*, rightfully viewed, requires not that the aider desire to bring about the crime, but that he act "as in" (that is, *as though*) he wished it to succeed—an objective test. As judge Posner has stated, this is not a subjective test; rather, "it has always been enough that the defendant, *knowing* what the principal was trying to do, rendered assistance that he believed would (whether or not he cared that it would) make the principal's success more likely....," a point with which, as has been shown, Perkins and Clark and

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[108] Id, at 508 (emphasis added). See also *United States v Irwin*, 149 F3d 546, 572-573 (CA 7, 1998); *Direct Sales Co. v United States*, 319 US 703, 63 S Ct 1265, 87 L Ed 1674 (1943); *People v Harsit*, 745 NYS 2d 872, (2002).

Marshall agree. The current Michigan instructions and case law on knowledge as being sufficient are correct.

C. Application of Law to the Facts

(1) Great Bodily Harm and Second Degree Murder

No support for the statement of the Court of Appeals that an aider and abettor is not guilty of second-degree murder unless he or she shares the intent of the principal to take life may can be found, and the opinion cites to none. It may well be, as in this case, that the principal is guilty of murder (even, as here, first-degree murder) because the malice prong of murder is shown by his or her possession of an intent to kill, and if the accomplice does not share this intent (and premeditate) he or she may not be guilty of murder in the first degree. But, of course, malice may be shown in other ways, and if the aider and abettor possesses either an intent to do great bodily harm, or acts with wanton and wilful disregard of the likelihood of death or great bodily harm, the mens rea of the crime of murder is established.[109] The People are nonplussed by the conclusion of the Court of Appeals to the contrary.

The court convicted defendant in this case of second-degree murder under the second prong of malice, the great bodily harm prong.[110] To convict an accused of second-degree murder, the prosecution must present sufficient evidence to prove 1) a death, 2) caused by an act of the

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[109] See e.g. *People v Langworthy,* 416 Mich. 630, 650-651 (1982)("The *mens rea* requirement for second-degree murder is supplied by the element of malice. While the intent to kill satisfies the malice requirement, it is not a necessary element of second-degree murder. An intent to inflict great bodily harm or a wanton and willful disregard of the likelihood that the natural tendency of a person's behavior is to cause death or great bodily harm may also satisfy the malice requirement").

[110]MCL § 750.317.

defendant, 3) done with malice, and 4) without justification or excuse.[111] This Court has defined malice as the intent to kill, the intent to do great bodily harm, or the intent to do an act in wanton and willful disregard of the likelihood that the natural tendency of the accused's actions will be to cause death or great bodily harm.[112] Either of the three types of conduct may suffice to prove malice.

Where the defendant has been charged as an aider and/or abettor to a murder, the proofs must show that 1) the underlying crime was committed by either the defendant or another, 2) defendant performed acts or gave encouragement by word or action that aided and assisted the commission of the crime, and 3) the defendant intended the commission of the crime or knew the principal intended the commission of the crime when defendant gave aid or assistance.[113] All of those requirements were met here by the prosecution.[114] Defendant and Pannell planned to go see Thomas and injure him severely. Defendant drove to Thomas's house after Pannell pointed it out. Pannell, armed with his gun, approached the house along with defendant, and Thomas answered the door when Pannell knocked. When Thomas opened the door, defendant hit him in the neck and then hit him again. Pannell punched Thomas as he fell to the floor, and then followed up by kicking Thomas as he lay on the floor. Defendant claimed he left the house at that point, but the evidence suggests he knew Pannell had a gun and was about to use it in some manner. Walker and defendant both said a shot rang out, and, since Pannell and Thomas were alone in the house at that point, defendant stated he knew Pannell had shot Thomas.

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[111] *People v Goecke,* 457 Mich. 442, 463-464 (1998).

[112] *Kelly,* supra, 273.

[113] *People v Smielewski,* 235 Mich. App. 196, 207 (1999).

[114] The People will return to the causation question shortly.

When defendant got back to Pannell's house alone in the car, he was furious with Pannell, and ready to pack up and leave with his girlfriend, Brewer. Clearly he was not furious about the beating since he agreed to participate in that but was upset over the shooting he knew about. Although he may not have pulled the trigger, defendant's actions in assaulting Thomas, in committing assault with intent to do great bodily harm, aided and assisted and induced Pannell to commit the further crime of killing Thomas. (The unprovoked and vicious beating of Thomas, in itself, might have caused death if unabated.)

There was no need for the factfinder to state that defendant had the intent to kill when he clearly committed an assault with intent to do great bodily harm during the incident. Even if one believed defendant's denial of knowledge that Pannell would kill Thomas, defendant's participation in and a leader of the actions which resulted in Thomas's death was sufficient evidence of his aiding and abetting, under Michigan law, such that he was guilty of second degree murder.

When this Court said in *People v Langworthy* that an intent to do great bodily harm might satisfy the *mens rea* requirement – the malice element – of second-degree murder,[115] it recognized that the intent requirement for an aider and/or abettor may not be greater than that required for conviction of the principal. Evidence may show that the principal had the intent to kill and that the aider committed assault with intent to do great bodily harm while assisting and inducing the principal to commit that crime and more. There is no requirement to prove the aider had an intent to kill.

That Pannell was convicted by a jury of first degree murder and defendant was only convicted of second degree murder on the same facts does not pose a problem. An aider and abettor can be convicted of a lesser offense than that of which the principal is convicted since the guilt of the

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[115]Id., 651.

aider/abettor depends on his actions and his particular state of mind during the incident, rather than those of the principal.[116] As the trial court made plain in its findings of fact, the actions and state of mind of defendant from the moment he left in his car with Pannell to the expressions he voiced when Pannell returned to the house were different from the actions and mindset of Pannell. One set of proofs supported the first-degree murder verdict, the other supported a verdict of second-degree murder.

Even if one concluded that defendant did not know Pannell had a gun when they entered Thomas's house (and this is matter to which defendant, by his own statement, was indifferent, saying Pannell may or may not have had a gun), the actions of defendant in driving Pannell to the location, of hitting Thomas first, then again, watching as Pannell kicked Thomas, and doing nothing to stop the violence, permitted the factfinder to conclude that Robinson's actions were sufficient to show aiding and/or abetting under Michigan law. Further, the court, as factfinder, could infer from the totality of the evidence that Robinson was aware that Pannell was armed. Note that Brewer said that defendant was so upset with Pannell about what had happened that he wanted to get away from Pannell when Pannell finally returned. Brewer also stated Robinson told her that Pannell had a gun, which fact was corroborated by Walker's testimony of seeing the passenger in Robinson's car, Pannell, reach into his pocket as Pannell walked toward Thomas's door.

A logical inference from that observation by Brewer with reference to defendant's self-serving statement supports a conclusion that defendant was that upset because he *was* aware that Pannell was armed, and that, perhaps, he even saw Pannell shoot Thomas. The inference is reasonable because of what defendant had done to Thomas and had seen Pannell do before the

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[116] *People v Folkes,* 71 Mich. App. 95 (1976).

shooting. Both men hit and beat Thomas, with Pannell, according to defendant, kicking him also. Thus, since defendant participated in the beating, it was not that assault which upset him so much but was more likely the shooting Pannell committed and that Robinson may have witnessed. That act was what prompted Robinson to tell Brewer that Pannell was "scandalous," not the beating.

Robinson's actions and words were forms of assistance that evidence a guilty mind which had as a goal the commission of a crime. Absent Robinson's participation in the entire incident, it is doubtful that Pannell would have shot Thomas. Robinson, then, was a true accomplice, an aider and abettor whose temperament and affirmative acts made it easier for Pannell to vent the rage he had for Thomas that evening. The trial court's verdict here of guilty of second degree murder on the great bodily harm prong was supported by the evidence.

(2) Causation, and Withdrawal

In addition to mistakenly requiring that an aider and abettor to murder harbor the intent to kill, the Court of Appeals here also found a lack of causation—"the cause of death was not injuries inflicted during the assault with intent to inflict great bodily harm: the judge found that death was caused by a gunshot to the victim's skull after Robinson left the scene." Intertwined here are principles both of causation and withdrawal. Under ordinary principles of causation defendant was responsible for the death of the victim. His actions in driving the enraged Pannell to Thomas's house, and striking Thomas twice when Thomas answered the door, allowing Pannell to get the upper hand, were the "but for" cause of Thomas's death. Unless they were remote causes, or a

superceding cause intervened, causation was established.[117] Defendant's actions cannot be described as akin to lightening striking the victim; he provided critical assistance to the defendant, and with the intent to cause great bodily harm, and the result of his actions was death. Nor are the acts of the defendant a superceding cause. A superceding cause may occur through the *independent* criminal acts of a third party.[118] Had Pannell and defendant left Thomas unconscious on the floor but not mortally wounded, and had a third party come along and fatally shot him, neither Pannell nor defendant would have been responsible for the death. And this is not a case of "natural and probable consequences." It is not the position of the People that Pannell's act of shooting Thomas to death was foreseeable by defendant—though it may well have been, and liability might be predicated on this basis, *if intent to take life was required for proof of murder*. But because murder has, as it were, alternative basis of liability in the three malice prongs, that defendant possessed one of them (the intent to kill), and that death resulted from his assistance in a way that was not remote, and not from the intervention of the criminal acts of a third party, he is liable for the murder (though not for first-degree murder).

It might be argued—as counsel did at trial—that even if defendant possessed the appropriate mental state for murder, and gave assistance rendering him responsible for the death, he *withdrew* from the crime before Pannell shot Thomas to death, and that this breaks the chain of causation. Assuming for the sake of argument that withdrawal is a defense to aiding and abetting, something

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[117] "In assessing criminal liability for some harm, it is not necessary that the party convicted of a crime be the sole cause of that harm, only that he be a contributory cause that was a substantial factor in producing the harm. The criminal law does not require that there be but one proximate cause of harm found. Quite the contrary, all acts that proximately cause the harm are recognized by the law." *People v Bailey,* 451 Mich. 657, 676 (1996).

[118] *People v. Tims*, 449 Mich 83 (1995); Perkins, Chapter 6, § 5.

which itself is not at all clear,[119] an aider and abettor must do more to break the chain of causation than simply walk away, as defendant claims to have done here. He made no attempt to inform the police, nor did he make any reasonable attempt to prevent the crime, instead simply going outside.[120]

Conclusion

This case is actually "about" causation and withdrawal. There is no question that defendant had a requisite mental state for murder in the second-degree (intent to do great bodily harm), and that the conclusion of the Court of Appeals that an intent to take life is essential for liability is unsupportable. Nor is there any question that defendant supplied material assistance to the principal while in possession of this state of mind. The result of this assistance was the death of the victim, and not in any remote way, or through the intervention of some third party unaligned with the two assaulters.

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[119] See e.g. *State v Kaiser*, 918 P2d 629 (Kan, 1996); *United States v Arocena*, 778 F2d 943, 948 (CA 2, 1985)("...withdrawal is not a defense to the substantive crime of aiding and abetting a murder").

[120] *People v. Trotter*, 701 N.E.2d 272,276 (Ill.App. 1 Dist.,1998)("A defendant will not be held accountable for the conduct of another if, "[b]efore the commission of the offense, he terminates his effort to promote or facilitate such commission, and ...wholly deprives his prior efforts of effectiveness in such commission, or gives timely warning to the proper law enforcement authorities, or otherwise makes proper effort to prevent the commission of the offense.... Testimony that a defendant merely discontinued active participation before the offense was complete, without taking some step to 'neutralize' the effect of his conduct, will not entitle a defendant to a withdrawal instruction"); 2 LaFave, *Substantive Criminal Law* § 13.3 ("One who has given aid or counsel to a criminal scheme sufficient to otherwise be liable for the offense as an accomplice may sometimes escape liability by withdrawing from the crime. A mere change of heart, flight from the crime scene, apprehension by the police, or an uncommunicated decision not to carry out his part of the scheme will not suffice. Rather, it is necessary that he (1) repudiate his prior aid, or (2) do all that is possible to countermand his prior aid or counsel, and (3) do so before the chain of events has become unstoppable"); 22 CJS Criminal Law § 136 (abandonment must occur "before the criminal act charged is in the process of consummation...."); see also 1 Robinson, *Criminal Law Defenses* (West: 1984), § 81(e);

If this Court were to adopt the reasoning of the Court of Appeals here, the intent element for murder would be become *greater* for an aider and abettor than it is for a principal. The law of murder in Michigan does not require such a result, for if multiple actors proceed to effectuate a common purpose, criminal in nature, and if acting on that purpose causes death, the crime is murder without regard to whether any of the actors specifically intended to cause death. Where two actors by their actions and words agree to inflict at the minimum great bodily harm on a third person, and death results, all may be found guilty of murder even should one claim, after the fact, that he never intended to kill the victim and was not aware the other had the intent to kill. The very nature of second degree murder, a homicide committed with malice but without premeditation and deliberation, would support a factfinder's conclusion of guilt of the accuseds where sufficient evidence is presented on the elements of the crime even if there is no direct evidence that an aider and abettor was aware of an intent to kill harbored by the principal.

Relief

WHEREFORE, the People ask this Court to reverse the Court of Appeals and to reinstate defendant's conviction and sentence.

Respectfully submitted,

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